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among others, indemnity from certain liabilities resulting from the position of trustee. While the defendant was a member of the club, at a regular meeting, a committee of which the plaintiff's testator was one, was authorized to lease certain premises for the occupation of the club and to become trustees thereof. This was done, the trustees executing the lease, with various onerous covenants for the payment of rent on which they became liable, and for indemnity from this liability the suit was brought. No agency was established and the broad question was whether, as the relation of trustee and *cestuis que trustent* existed, the *cestuis* were bound to indemnify the trustee against all losses sustained by reason of his ownership of the trust *res*. The case was treated by the court as one of novel impression, the conclusion reached being that the defendant was not liable.

Lord Lindley who delivered the opinion had only two years before, *Hardoon v. Belilios* (1901) 70 L. J. P. C. 9, declared in emphatic terms that the right of a trustee to indemnity from the *cestui*, where acting within the terms of his trust, was a right springing inevitably out of the trust relation. This right of the trustee, based apparently on the equitable principle that he who has the benefits shall also bear the burdens of ownership seems well established in the English law. *Hardoon v. Belilios*, *supra*; *Castellan v. Hobson* (1870) L. R. 10 Eq. 47. Conceding, however, under the facts in the principal case that the relation of trustee and *cestuis que trustent* existed and admitting the equitable principle that the beneficial owner should bear the burdens of ownership, the decision is sound since the evidence of club usage established the terms of the trust. The case is analogous where the trust deed expressly provides for indemnity, and where the *cestui que trust* is not liable beyond the sum so stipulated. *Gillan v. Morrison* (1847) 1 De Gex & Sm. 421, *Selwyn v. Harrison* (1862) 2 J. & H. 334. To reach a result contrary to the principal case would be to impose a liability inconsistent with the terms on which the defendant became a member of the club.

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LIABILITY OF SHAREHOLDERS IN A "DE FACTO" CORPORATION.—Are stockholders in an association, acting as a corporation, partners *inter sese*, where a *bona fide* attempt to comply with the requisites of incorporation has failed? This question was answered in the negative by the Supreme Court of Maryland in a suit for an accounting on a partnership basis by the plaintiff, a minority stockholder, against the defendant, the majority stockholder, in a corporation which had failed to comply strictly with the statute. *Cannon v. Brush Electric Co., et al.* (1903, Md.) 54 Atl. 121. Conceding that the company had no legal existence as a corporate body, the court went on the ground that the parties intended to be bound by their charter; and that such intent would be given effect as between themselves, whatever might be their relation to third parties. Did the parties intend to define their relation in the event of their failure to become a corporation, when their charter was only to take effect upon corporate existence being accomplished? They intended to become stockholders in a corporation, doubtless, but this they failed to do. They did not provide for what has happened, and the law, therefore, must predicate their relation from their acts. Under such circumstances, the authorities are at

variance as to the relation of the shareholders, when acting *inter sese* or where third parties are concerned. In a number of jurisdictions, the view that they are co-partners, merely, is taken. The reasons for the doctrine are set forth in Parsons (James) on Partnership, (1899) § 44, and the authorities are collected in a note to *Rutherford v. Hill* (1892) 17 L. R. A. 549; *Hurt v. Salisbury* (1874) 55 Mo. 310; *Whipple v. Parker* (1874) 29 Mich. 369. The reasoning, in brief, is that the parties have carried on and controlled the business through their agents, and shared the profits, and thus, having made themselves principals in the undertaking, their liability as partners follows, unless they have received from the State a right to interpose between themselves and liability a corporate existence. *Pooley v. Driver* (1876) L. R. 5 Ch. D. 458. In *Farnum v. Patch* (1880) 60 N. H. 294 a "shareholder" in an unincorporated business was allowed to recover against a "co-shareholder" on a partnership basis, irrespective of the mutual intent of the parties to become shareholders in a corporation. "They were principals in the business \* \* \* and must be partners."

On the other hand, in perhaps the majority of jurisdictions, it is held that where members of an intended corporation attempt in good faith to comply with the conditions of the law and thereafter act as if there was a valid corporation, they will be treated as a corporation *de facto*, if they have failed to become one *de jure*, and will enjoy the rights of the latter. Morawetz on Private Corporations (2d Ed.) II § 748, and cases cited. In such cases, neither third parties dealing with the shareholders, *Coxe v. State* (1895) 144 N. Y. 396 (except the attorney-general in *quo warranto*) nor the shareholders dealing with third parties, *Eaton v. Aspinwall* (1859) 19 N. Y. 119; *Cooper v. Shaver* (1862) 41 Barb. 151, can impeach its corporate capacity. But this is only where there is a *bona fide* attempt to incorporate. The authorities are uniform in deciding that the parties are liable as partners where they have not "colorably" complied with the law, *Hess v. Werts* (Pa. 1818) 4 S. & R. 356; *Dewitt v. Hastings* (1876) 40 Sup. Ct. R. 463, *aff'd* 69 N. Y. 518; *Montgomery v. Forbes* (1889) 148 Mass. 249; *Bigelow v. Gregory* (1834) 73 Ill. 197, although the intent is the same here as where they have done enough to give "color" to the transaction. *Hess v. Werts, supra*; *Eaton v. Walker* (1889) 76 Mich. 579. This theory of the *de facto* corporation is put on various grounds. Some jurisdictions find an estoppel: that the parties having dealt with the association as a corporation are estopped to deny its corporate existence. See *Heaton v. R. R. Co.* (1861) 16 Ind. 275. It is difficult to justify this view on strict legal theory, for it is often tacitly admitted that the elements of a common law estoppel are lacking. Again, it is said that the corporation exists in fact, though illegally formed. Morawetz on Private Corporations II § 745. But here also the question arises: if they have not come within the terms of the grant from the State, why are they more than a business association? Or still another view is that the agent of the illegal corporation is not the agent of the "shareholders" as he does not act for them but for the supposed corporation. *Ward v. Brigham* (1879) 127 Mass. 24. The true justification seems to lie in the view taken by *Society Perun v.*

*Cleveland* (1885) 43 Ohio St. 481. In that case the city of Cleveland had conveyed lands to the society which the latter had encumbered with various mortgages. Thereafter the attorney-general had the society adjudged not to have been legally incorporated. The question was whether the society could be grantee from the city as a *de facto* corporation. It was *held*, that the doctrine of *de facto* corporations is not based on any theory of estoppel but on public policy, and that a corporation *de facto* may be a grantee. "The highest considerations of public policy and fair dealing protest against treating such an organization as a nullity, and all of its transactions void." The *de facto* corporation then can be justified on no principle of law. It is an expedient, a fiction, adopted to attain a just result when the parties have failed to give true legal effect to their intentions—an equitable as opposed to a legal doctrine.

The question then remains whether there is any ground for distinction between the case where third parties are concerned, and the case where the "shareholders" are acting *inter sese*. On strict legal theory their relation should be the same in both cases, for if they are partners to the world, this relation results from the status created by their acts, *Coleman v. Coleman* (1881) 78 Ind. 344; *Parsons* (James) on Partnership §§ 45, 48, 50; *Whipple v. Parker*, *supra*, and not by reason of any holding out—they held themselves out as a corporation. However, there are jurisdictions which regard the same association as a corporation under certain circumstances but as a partnership under other circumstances. The cases of *Bushnell v. Consolidated Ice Machine Co.* (1891) 138 Ill. 67 and *Loverin v. McLaughlin* (1896) 161 Ill. 417, taken together, illustrate this. In the former case one shareholder was not allowed to sue another on a partnership basis, since both parties had intended to stand towards each other in the position of shareholders in a corporation. In the latter case, the shareholder was not allowed to rely on the *de facto* corporation to avoid his personal liability as a partner to a third party. If rigidly adhered to, this position would lead to the unjust result that a shareholder might be liable to third parties as a partner for the association's obligations, but then would be unable to compel contribution from his fellow-shareholders on a partnership basis. In Maryland, where the principal case was decided, it has been held that the shareholders are partners as to third parties. *Buonaparte v. Hampden* (1892) 75 Md. 340. It seems therefore, logical and just that they should be so treated *inter sese*, a result contrary to that reached in the principal case.

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THE LOTTERY CASE.—In the latest decision on the distribution of powers under our federal system, the Supreme Court has again taken a national point of view. *The Lottery Case* (1903) 188 U. S. 321. In holding that Congress may prohibit the carrying of lottery tickets by carriers from one State to another, it has strengthened the central government in two particulars. First, the commerce which Congress may regulate is conceived of broadly; and second, the power of regulating it is held to include to some extent the power of prohibiting it.

Lottery tickets are subjects of commerce, says the Court, because they are subjects of traffic. There would seem to be no objection to